No. 10974

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. J. HEBETS,

Appellant,

vs.

BENSON G. SCOTT,

Appellee.

APPELLANT'S OPENING BRIEF

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION

Appellant, a real estate broker and a resident of the State of Arizona, (T. 3), brought this action against Appellee, a resident and citizen of the State of California. (T. 3). In his amended complaint he alleged that on or about June 1, 1943, the Appellee

employed him to obtain a purchaser for real estate that the Appellee owned in Maricopa County; that the Appellee agreed to pay him a commission of 5% on the sale price; that a memorandum of such promise and agreement was in writing and signed by the Appellee; that on or about September 20, 1943, the Appellant negotiated a sale for Appellee's land under the terms of the agreement, which the said purchaser was willing, ready and able to complete on the terms agreed to by appellee; that Appellant performed all of the conditions of his contract and was entitled to be paid his commission amounting to the sum of Five Thousand Four Hundred and no/100 dollars ($5,400.00).

A second cause of action was set forth alleging that Appellant had performed services for the Appellee at his request in the selling of said real estate for the sum of One Hundred Eight Thousand ($108,000.00) Dollars, and that such services were reasonably worth the sum of Five Thousand Four Hundred ($5,400.00) Dollars. (T. 6-9).

Appellee answered that he did not employ the Appellant; that he did not agree to pay him a commission and that there was no memorandum of any such promise or agreement in writing or signed by the Appellee. He denied that the Appellant had negotiated a sale of the land; that the Appellant had ever procured a purchaser, and that there was ever any agreement between the parties in respect to the Appellee's land. He admitted that he had not paid the Appel-

lant anything and denied that he owed the Appellant any amount. In answer to the second cause of action he denied that the appellant had performed services for the Appellee or that he ever entered into any agreement with the Appellant. He denied that any services performed were worth Five Thousand Four Hundred ($5,400.00) Dollars or any amount and admitted that he had not paid the Appellant anything, and denied there was a memorandum of the alleged promise or agreement in writing signed by the Appellee. (T. 9-12).

Appellee filed his motion for summary judgment, to which was attached forty-three documents (T. 12-54), which documents the parties stipulated to be full, true and correct copies of all the writings by and between the parties in the possession of or known to the parties with respect of the promise or agreement set forth in the Appellant's complaint. (T. 55).

The Court made its findings of fact and conclusions of law (T. 58-59), wherein it found that the said writings contained no memorandum in writing, signed by the Appellee or any person by him thereunto lawfully authorized, of the promise or agreement alleged in the Appellant's complaint and concluded that the claims alleged in the Appellant's complaint were barred by the provisions of Section 58-101 Arizona Code Annotated 1939. Accordingly judgment was rendered by the Court dismissing Appellant's complaint, (T. 60), from which judgment and findings Appellant has appealed to this Court.

The statutory provision supporting the jurisdiction of the district court is 28 U. S. C. A. Section 41.

"The District Courts shall have original jurisdiction as follows: (1) When the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and, * * * (b) is between citizens of different states * * *."

The statutory provision giving this honorable Court jurisdiction on appeal is 28 U. S. C. A. Section 225, (a), as follows:

"The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal, or writ of error, final decisions—First, in the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

The pleadings show the existence of jurisdiction in the amended complaint (T. 6), and the petition for removal (T. 3).

Notice of appeal was filed on January 8, 1945 by Appellant (T. 62). The bond on appeal was filed on February 8, 1945, (T. 63). The designation of contents of record on appeal was filed on the 8th day of January, 1945 (T. 67), along with the statement of point on which Plaintiff and Appellant intends to rely on appeal (T. 64). A stipulation of parts of record to be included in the record on appeal was filed on January 16, 1945 (T. 67). The record on appeal was filed and the action docketed on January 30, 1945

with the Clerk of this Court (T. 68) and on the same day Appellant filed in this Court his designation of parts of the record which Appellant considered necessary for the consideration of the appeal, (T. 71) and his statement adopting statement of point on which Plaintiff and Appellant intends to rely on appeal (T. 69).

By virtue thereof, all of which proceedings were taken within the time provided by the Federal Code, 28 U. S. C. A. Section 230 and the rules of this Court, this cause is now before this honorable Court.

STATEMENT OF CASE

This action is to recover a commission upon a broker's agreement for procuring a purchaser ready, willing and able to buy the Appellee's real estate.

Appellee's motion for a summary judgment, which was granted by the District Court, was based upon the proposition that such action could not be maintained because the promise or agreement or some memorandum thereof was not in writing and signed by the Appellee. Hence the action was barred by Section 58-101 Arizona Code Annotated 1939, the pertinent parts of which are as follows:

> "No action shall be brought in any Court in the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing

and signed by the parties to be charged therewith, or by some person by him thereunto lawfully authorized:

'7. Upon an agreement authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or a commission;'.

Forty-three documents (T. 14-54), consisting of letters and telegrams of the parties which are stipulated to be correct copies of the correspondence between them are relied upon by the Appellant as sufficient memoranda in writing of the agreement or promise to enable Appellant to maintain this action.

Appellee's position is that such documents are insufficient to take the transaction out of the operation of the statute.

SPECIFICATIONS OF ERROR

1. The District Court erred in its finding of fact (T. 58, 59) that said writings contained no memorandum in writing signed by the Appellee or any person by him thereto lawfully authorized of the promise or agreement alleged in Appellant's amended complaint in that said writings do constitute sufficient memoranda in writing signed by the Appellee of an agreement authorizing or employing Appellant as his agent or broker to sell real property for compensation or a commission, to enable the Appellant to maintain this action.

2. The District Court erred in its conclusion of law, (T. 59) that the claim alleged in the amended complaint is barred by the provisions of Section 58-101, Arizona Code Annotated, 1939, for the reason that the agreement upon which Appellant's action was brought or some memorandum thereof is in writing and signed by the Appellee and is not barred by the said statute.

3. The District Court erred in granting Appellee's motion for a summary judgment and rendering judgment (T. 60) dismissing the amended complaint for the reason that the said writings constitute sufficient memoranda in writing signed by the Appellee to enable the Appellant to maintain this action.

SUMMARY

The said writings (T. 14-54) are sufficient to meet the requirements of Section 58-101 Arizona Code Annotated 1939; that an action shall not be brought upon an agreement authorizing or employing an agent or broker to purchase or sell real property for compensation, unless such promise or agreement or some memorandum thereof be in writing and signed by the parties to be charged.

1. A contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties.

2. The statute of frauds is merely a rule of evidence, and a contract will be construed if it may consistently be done to be effective rather than ineffective under the statute of frauds.

3. All that is necessary to take a contract out of the operation of the statute of frauds is that the essential elements of the contract be expressed in writing and signed by the party to be charged.

4. Subdivision 7 of Section 58-101 Arizona Code Annotated, 1939, with the construction placed upon it by the California Courts was lifted from the law of California and such construction is controlling.

5. Said writings contain all of the essential elements of the agreement and are sufficient to take the agreement out of the operation of the statute of frauds.

ARGUMENT

POINT I.

A CONTRACT BINDING UNDER THE STATUTE OF FRAUDS MAY BE GATHERED FROM LETTERS, WRITINGS AND TELEGRAMS BETWEEN THE PARTIES.

In the case of Bartlett-Heard Land & Cattle Co. v. Harris, 28 Ariz. 497, 238 Pac. 327, where the Court was considering the Arizona statute of frauds it is stated on page 329:

> "And, of course, several letters and telegrams may be taken together and considered with reference to each other, in order to make up the required memorandum,"

Citing with approval the case of Bibb vs. Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

In the case of Ryan vs. U. S., 136 U. S. 68, 10 S. Ct. 913, 34 L. Ed. 447, the Court held that a complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract.

To the same effect is the case of McCartney vs. Clover Valley Land & Stock Co. (C.C.A. 8th), 232 Fed. 697, 1 A.L.R. 1127.

POINT II.

THE STATUTE OF FRAUDS IS MERELY A RULE OF EVIDENCE AND A CONTRACT WILL BE CONSTRUED IF IT MAY CONSISTENTLY BE DONE TO BE EFFECTIVE RATHER THAN INEFFECTIVE UNDER THE STATUTE OF FRAUDS.

In the case of Bartlett-Heard Land & Cattle Co. vs. Harris, (Ariz.) supra, the Court stated on Page 329:

> "The statute of frauds is merely a rule of evidence, and not one governing the making of a contract, and its purpose is to prevent a party from being compelled, by oral and perhaps false

testimony, to be held responsible for the conditions of a contract he claims he never agreed to. But, if that party has offered in writing to make the very contract with which it is sought to charge him, he has over his own signature admitted his willingness to be held thereby, and cannot justly complain because the acceptance of the other party who seeks to hold him is oral."

In Hall vs. Rankin, 22 Ariz. 13, 193 Pac. 756, in a case involving the Arizona statute of frauds, the court stated on page 757:

> "It is a familiar canon of construction to construe a contract, if it may consistently be done, to be effective, rather than ineffective."

POINT III.

ALL THAT IS NECESSARY TO TAKE A CONTRACT OUT OF THE OPERATION OF THE STATUTE OF FRAUDS IS THAT THE ESSENTIAL ELEMENTS OF THE CONTRACT BE EXPRESSED IN WRITING AND SIGNED BY THE PARTY TO BE CHARGED.

In the case of Bartlett-Heard Land & Cattle Co. vs. Harris, (Ariz.) supra, the Court stated on Page 329:

> "Now no particular form of language or instrument is required. Any document, written either to evidence a contract or for any other purpose,

is enough, if it states all the assential elements of the contract with reasonable certainty and is signed by the party to be charged or his agent."

POINT IV.

SUBDIVISION 7 OF SECTION 58-101 ARIZONA CODE ANNOTATED, 1939, WITH THE CONSTRUCTION PLACED UPON IT BY THE CALIFORNIA COURTS WAS LIFTED FROM THE LAW OF CALIFORNIA AND SUCH CONSTRUCTION IS CONTROLLING HERE.

Prior to 1913, the Arizona statute of frauds contained no provision requiring that a real estate broker's contract be in writing. An action could at that time be maintained on a parole contract. Friedman vs. Suttle, 10 Arizona. 57, 85 Pac. 726.

Although the original Arizona statute of frauds came from Texas, Murphy vs. Brown, 12 Ariz. 268, 100 Pac. 801, subdivision 7 of Section 58-101 Arizona Code Annotated 1939, undoubtedly was lifted from the California statute. It was passed at the 2nd Special Session of the First Legislature in Arizona and made its first appearance as subdivision 7 of Section 3272 of the 1913 Arizona Civil Code.

The language of the Arizona provision is almost identical with that of California. See subdivision 6, Sec. 1624, California Civil Code, set forth in Kennedy vs. Merickel (Cal.), 97 Pac. 81, at page 82.

The Arizona Supreme Court stated in the case of Brought vs. Howard, 30 Ariz. 522, 249 Pac. 76, that subdivision 8 of Section 3272, 1913 Ariz. Civil Code, "was lifted bodily from the California law." Said subdivision 8 was enacted by the same session of the first Arizona legislature that enacted subdivision 7 and made its first appearance in the Arizona law in Section 3272 of the 1913 Arizona Civil Code along with said subdivision 7.

In Murphy vs. Smith, 26 Ariz. 394, 226 Pac. 206, at page 207 the Arizona Supreme Court stated that said "subdivision 7 of Section 3272 is, for the purposes of this case, identical with subdivision 6 of Section 1624 California Civil Code." In view of these circumstances, there is no doubt that this particular subdivision 7 came from California.

It is a well established rule in Arizona that a statute adopted from another state will be presumed to have been adopted with the construction previously placed upon it by the courts of that state. Henrietta Mining & Milling Co. vs. Gardner, 173 U. S. 123, 19 S. Ct. 327, 42 L. Ed. 637. It has also been held that such construction is controlling, Territory vs. Copper Queen Consolidated Mining Co., 13 Ariz. 198, 108 Pac. 960, affirmed 233 U. S. 87, 34 S. Ct. 546, 58 L. Ed. 863.

In view of the fact that the courts of Arizona have not decided the question involved in this case, the liberal construction placed upon this particular statute by the courts of California and in existence at the time the statute was adopted by Arizona should govern and control here.

POINT V.

SAID WRITINGS CONTAIN ALL OF THE ESSENTIAL ELEMENTS OF THE AGREEMENT AND ARE SUFFICIENT TO TAKE THE AGREEMENT OUT OF THE OPERATION OF THE STATUTE OF FRAUDS.

It is therefore proper to examine the letters and telegrams between the parties to ascertain if there can be found therein sufficient memoranda to take the alleged contract out of the operation of the statute of frauds.

The correspondence between the parties covers the period from January 8, 1942, through December 10, 1943.

The first letter is one from the appellant to the Appellee of January 8, 1942, which refers to former correspondence (T. 14) about a listing upon the Appellant's

> "360 acres of land here in Section 31, Township 2 North, Range 2 East."

On February 2nd, 1942, Appellant wrote Appellee asking if he would consider

> "taking two 40's in on trade or if not if" he "would consider selling 160 acres of it and at what price." (T. 14 & 15).

On February 4th, 1942, Appellee wrote Appellant (T. 15)

> "I certainly would not be interested in taking two small pieces unless I could get them for less than their market value."
>
> This is a good ranch and a property involving considerable money."

Appellant telegraphed Appellee an offer of $90,000.00 cash for his 360 acres (T. 21), to which Appellee replied on March 12, 1943, by telegram:

> "Thanks for offer. Not enough now. Will be over the first of April. See you then." (T. 22).

These excerpts from the correspondence leave no doubt whatever that the real estate was 360 acres of land belonging to the Appellant located in Section 31, Township 2 North, Range 2 East, Maricopa County, Arizona. This is more than sufficient to measure up to the requirements as to the identity of the real estate.

Pray v. Anthony (Calif.)
274 Pac. 1024.

Needham v. Abbott Kinney Co. (Calif.)
17 Pac. 2nd 109.

That the Appellee intended to pay the regular broker's commission of 5% on any sale made by Appellant is equally apparent from the correspondence.

In his letter of March 6, 1942, (T. 18), Appellant states:

> "However, we would have to be assured that in the event we forced a sale to Smith to match our offer that we would be paid our 5% commission."

Again in Appellant's letter of June 12, 1943, (T. 28)

> "Leo expects to make the offer less the commission and then sell some part of it off. I was in hopes that you would not mention who was bidding on the place since it gives him a good opportunity to talk them out of it, since most of the neighbors do not care to bid against a $5,000.00 handicap."

In Appellee's letter to Appellant of July 7, 1943, (T. 30) he states:

> "I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands, I shall give you ample time to work out anything you may have in mind. At this time you are the only firm who knows I would consider selling at all."

To this letter, the Appellant replied on July 10, 1943 (T. 32):

> "I appreciate your kindness to us in not putting the place in other broker's hands and I

> know that you are very fair-minded. However, the fact remains if the place is sold for $300.00 per acre it will be due to our efforts in a large measure and I think that we have come nearer earning the commission than Leo has."

In Appellee's letter, dated Saturday, 18th, which evidently is in response to Appellant's telegraphic request for an answer to his wires of September 20th and October 8th, 1943, Appellee states: (T. p. 44):

> "and Morse get this straight, no one ever worked on my affairs, or did me a favor that he didn't get just compensation for it, so take it easy and keep your eyes and ears open for a proposition that will bring us both in an honest dollar or two."

Appellee could not have possibly understood anything other than that Appellant intended to receive a 5% commission on the sale. He confirms this understanding by his silence and by continuing to encourage the Appellant to obtain offers for the purchase of the property and by advising Appellant he will not place the property in the hands of any other broker without giving Appellant ample time to work out anything he may have in mind and finally by telling Appellant that no one ever worked on his affairs who did not get just compensation for it.

There is no issue involved in this appeal as to whether or not the Appellant performed the agreement. We are concerned solely with the issue as to whether or not there is sufficient memorandum in writing to show that Appellee employed appellant.

The following excerpts from the correspondence show very definitely that the Appellee authorized and empowered the Appellant to sell his property.

On February 4th, 1942, Appellee wrote Appellant (T. 15):

> "This is a good ranch and a property involving considerable money. If you have a buyer definitely interested and willing to pay the market price for it, let me have an offer that is a business one."

On February 16, 1942, Appellee wrote Appellant (T.17):

> "I shall be over soon; at which time I will look you up. In the meantime if you have a deal that you think will interest me, let me know.
>
> However, as the picture looks at this time I won't consider anything less than two hundred net. So unless you have a buyer that wants to pay a good price don't waste your time on this deal.
>
> The best way to get me to sell is to offer me another piece that I can profitably buy. I am willing to trade at any time."

On March 12, 1943, Appellee telegraphed Appellant in response to an offer submitted to him by Appellant: (T. 22):

"Thanks for the offer. Not enough now. Will be over the first of April. See you then."

On May 31, 1943, Appellee wrote Appellant: (T. 25)

"I might be able to work out a combination deal on it, that is, if you sell my other place."

On July 7, 1943, Appellee wrote Appellant: (T. 30)

"I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands I shall give you ample time to work out anything you may have in mind. At this time

you are the only firm who knows I would consider selling at all.

"There is this angle. I am not raising the price on the place at this time, but six months from now the picture may be quite different. Price changes are moving very rapidly just now. But know you understand that angle.

"If you should develop something that is a deal shoot me a letter on it. I will do my best to work it out for you."

Appellee states in his letter of Saturday, the 18th: (T. 43 & 44).

"On the matter of the deal: I understand just about what you are thinking, and from your point of view you have a right to think that I am a hell

of a guy to do business with. However I shall not attempt to do anything until I am in Phoenix. Of course this may well cost me more by several times than I am making here, and yet damned if I can get away.

The trade your party has sounds as if I might want it, but again, I can make no decision until I see it.

"It is not clear to me that your party will definitely buy. I think you know all there is to know about that place, and the lease. Will your party make a definite offer and put up some earnest money to bind it, for the property, subject to the lease, and for delivery on a certain date. In short, is this a deal or is it a prospect. If it is a prospect I will not feel too badly if we delay for another week or ten days. If you have the deal ready to close I will cut my time in the San Joaquin as short as possible and get there a few days earlier. Write me a line at this address and they will send it on up to me, or better still send it to my Visalia address.

"And Morse get this straight no one ever worked on my affairs, or did me a favor that he didn't get just compensation for it, so take it easy and keep your eyes and ears open for a proposition that will bring us both in an honest dollar or two."

The language set forth in the letters and telegrams written by the Appellee to the Appellant and set forth above is not ambiguous or uncertain as to meaning. It is perfectly plain and clear and the Appellant was justified in interpreting the language to mean exactly what it said.

These letters and telegrams were written by the owner of a piece of real estate to a real estate broker. The owner requested the broker to obtain an offer for the sale of his property on at least three different occasions. He acknowledged and recognized Appellant as his broker and assured him he would "give" him ample time to work out anything "if he decided to put it" in other hands. The real estate broker obtained offers and submitted them to the owner who rejected them because they were not large enough. All this took place after the owner knew that the broker was expecting the owner to pay the regular 5% commission if he sold the property.

In the case of Curran vs. Hubbard (Calif.), 114 Pac. 81, a broker received the following communication from a real estate owner:

> "Ontario, December 6-08. My orange grove is lot 645, Ontario Colony. My price is $12,000. Get me an offer. O. H. Hubbard, 3526 S. Figueroa St."

The court there stated:

> "The memorandum should be considered as a whole, and thus considered it clearly appears

> therefrom that defendant described his property, stated the price upon the basis of which he would sell or exchange, and, by the words 'get me an offer', used in the memorandum delivered to plaintiff, intended to and did authorize and employ him to find someone to whom a sale or satisfactory exchange could be made. Any other interpretaition would be meaningless. * * * The memorandum was a sufficient compliance with the statute, and showed that plaintiff was employed by defendant to make a sale or satisfactory exchange of defendant's property, and not merely to procure a single offer of purchase or exchange. The words 'employed plaintiff to find an offer', as used in the finding, are susceptible of no other interpretation than that plaintiff was employed to find a satisfactory offer—one which defendant was willing to or did accept."

Did not the Appellee acknowledge that the Appellant was authorized to act as his agent for the purpose of selling his property when he stated: (T. 30).

> "I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands I shall give you ample time to work out anything you may have in mind."

Could there have possibly been any doubt in the Appellee's mind as to the authority of the Appellant to negotiate a deal for him when he wrote the Appellant: (T. 44).

> "If you have the deal ready to close I will cut my time in the San Joaquin as short as possible and get there a few days earlier."

In the case of Kennedy vs. Merickel (Calif.) 97 Pac. 81, the Court says.

> "A writing signed by the owner and addressed to the broker expressly or impliedly acknowledging his authority to act as agent for the purposes of the sale is a sufficient compliance with the statute. The purpose of the statute being to prevent the assertion of false claims for compensation by brokers and agents against owners of real estate, which was possible under the old rule, it is sufficient if it be shown that the party to be charged has recognized the broker as his agent by a writing subscribed by him." .....

In a later California case Cowing v. Wofford, 229 Pac. 883, at page 884, the Court stated in regard to the California statute:

> "Under the code provisions the chief element is the employment. It is not requisite that the memorandum should be an instrument by the terms of which the agent is empowered to so bind the principal as to support an action for specific performance."

Appellant does not contend that the Appellee placed this property in his hands and authorized him to sell

it without submitting the deal to the Appellee for his approval. On the other hand, Appellant does contend that Appellee authorized him to obtain and negotiate a deal for the sale of the property, which would be acceptable to the Appellee; that such a deal was made; that Appellee agreed to it with the purchaser with whom the Appellant had negotiated the deal; that afterwards the Appellee went back on the proposition he had accepted, and refused to pay the Appellant for the services he had rendered. However, as stated before, the question of performance on the part of Appellant is not here involved. The sole question here is whether or not these letters constitute sufficient memorandum of the Appellant's authority to negotiate a deal for the sale of Appellee's property subject to the Appellee's approval.

The Circuit Court of Appeals of the Eighth Circuit recognized the settled construction of this statute in California in the case of McCartney v. Clover Valley Land & Stock Co., 232 Fed. 697 (C.C.A. 8th) 1 A.L.R. 1127. There the Court states:

> "The writing which it demands may be embodied in letters and telegrams. All that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged, or by his agent."

All that was necessary in California at the time Arizona lifted this particular section from its code was that the fact of employment be expressed in writing,

signed by the party to be charged. Certainly that fact appears in Appellee's letters.

These writings express all of the essential elements of the contract. They more than measure up to the requirements of the statute.

It is submitted that the holding of the learned District Court that the writings contain no memorandum in writing signed by Appellee of the promise or agreement alleged in Plaintiff's amended complaint is erroneous and does violence to the plain and unambiguous language of Appellee's letters and the ordinary and orderly way of business transactions by mail.

HILL, ROBERT & HILL,

By .....

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Attorneys for Appellant.

Three copies of the foregoing Appellant's Opening Brief were served on me this.....day of....., 1945.

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Attorney for Appellee.